

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DETROIT EDISON COMPANY,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

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UNPUBLISHED

June 25, 2009

Nos. 278778; 286460

Wayne Circuit Court

LC No. 02-243159-NZ

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

In Docket No. 278778, defendant city of Detroit appeals by leave granted from the trial court's order denying its motion for summary disposition and granting summary disposition in favor of plaintiff, Detroit Edison Company, pursuant to MCR 2.116(C)(10) in this indemnification action. In Docket No. 286460, defendant appeals as of right from the trial court's order awarding plaintiff case evaluation sanctions. We affirm the trial court's order granting summary disposition in favor of plaintiff, but reverse the award of case evaluation sanctions and remand for further proceedings.

This case arises from the death of ten-year-old Victor Carlos Cooksey, who was electrocuted by defendant's downed electrical wire as he was walking home from school. Cooksey's estate brought a negligence action against both plaintiff and defendant. Plaintiff entered into settlement negotiations with Cooksey's estate and invited defendant to participate, but defendant declined to do so. Plaintiff later informed defendant that it intended to settle the Cooksey estate's lawsuit for \$2.3 million and requested that defendant participate in the settlement negotiations and contribute toward the settlement, but defendant again refused.

After plaintiff settled the underlying action, it brought this action against defendant to recover the amount of its settlement. The trial court dismissed plaintiff's claims on the basis of governmental immunity. In a prior appeal, this Court affirmed the dismissal of plaintiff's claims, but held that the trial court abused its discretion in denying plaintiff's motion to amend its complaint to assert a claim for contractual indemnification, which had not been previously pleaded. *Detroit Edison Co v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2006 (Docket No. 257667).

On remand, plaintiff filed an amended complaint asserting a claim for contractual indemnification based on the following clause in an agreement between plaintiff and defendant:

The electric energy supplied under this agreement is supplied under the express condition that after it passes the point of delivery, as specified in Section 3.1 hereof, such energy becomes the property of the City and Edison shall not be liable for, and shall be held harmless by the City against loss or damage to any person or property whatsoever, resulting directly or indirectly from the use, misuse, or presence of the said electric energy on the city's premises, or elsewhere, after it passes the point of delivery to the City, except where such loss or damage shall be shown to have been occasioned by active negligence of Edison, its agents or employees.

The parties thereafter filed cross-motions for summary disposition on the issue of defendant's liability for indemnification. The trial court denied defendant's motion, granted plaintiff's motion, and ordered defendant to indemnify plaintiff for the settlement amount of \$2.3 million. The court also awarded plaintiff case evaluation sanctions of \$198,964.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

#### I. Docket No. 278778

Initially, we reject defendant's claim that enforcement of the contractual indemnity provision improperly abrogates its statutory immunity under MCL 691.1407. The immunity from *tort* liability established by MCL 691.1407 does not extend to contract actions. *Koenig v City of South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999). Defendant's reliance on *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), is misplaced because that case did not involve a contract action.

Further, defendant's argument that the indemnity clause is not enforceable because defendant was not authorized to enter into an indemnity agreement was rejected by this Court in the prior appeal in this case. *Detroit Edison Co, supra*, slip op at 5-6. Contrary to what defendant argues, this Court's discussion of this issue was not dicta because it was necessary to the Court's determination whether the trial court properly denied plaintiff's motion to amend. *Ross v Blue Care Network of Michigan*, 480 Mich 153, 173; 747 NW2d 828 (2008); *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Therefore, this Court's prior decision is binding under the law of the case doctrine. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995).

Next, defendant argues that the trial court erred in ruling that plaintiff was not required to establish its actual liability in the underlying action in order to recover under the indemnity clause. Defendant asserts that because plaintiff never tendered the defense of the underlying

action, plaintiff was required to prove its actual liability to the plaintiff in the underlying action as opposed to only its potential liability. We disagree.

Defendant relies on *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354-355; 686 NW2d 756 (2004), in which this Court stated:

Two general principles of law, applicable to contractual indemnity in this context, are well established. First, if an indemnitee settles a claim against it before seeking the approval of, or tendering the defense to, the indemnitor, then the indemnitee must prove its *actual* liability to the claimant to recover from the indemnitor. However, the indemnitee who has settled a claim need show only *potential* liability if the indemnitor had notice of the claim and refused to defend. 41 Am Jur 2d, Indemnity § 46, pp 380-381; *Consolidated Rail [Corp v Ford Motor Co]*, 751 F Supp 674, 676 (ED Mich, 1999)].

These principles, and the policy underlying their formulation, were directly addressed in *Ford v Clark Equip Co*, 87 Mich App 270, 276-278; 274 NW2d 33 (1978). If (1) an enforceable contract of indemnity exists, (2) a seasonable tender of defense is made with notice that a settlement will be entered, and (3) the tender of defense is refused, an indemnitee need show only potential liability to recover on a contract of indemnity. To require a showing of actual liability in these circumstances places too heavy a burden on a defendant who settles after a tender of the defense to the contractual indemnitor and would undermine this state's policy of encouraging the settlement of lawsuits. *Id.* at 277. "The settlement of a suit benefits both parties and the public." *Id.*

However, the Court in *Grand Trunk* also explained:

Contractual indemnity is an area of law guided by well-settled general principles. Nonetheless, each case must ultimately be determined by the contract terms to which the parties have agreed. Where the parties have contracted to create duties that differ or extend beyond those established by general principles of law, and the terms of the contract are not otherwise unenforceable, the parties must abide by the contractual duties created. [*Id.* at 351. Citation omitted.]

Thus, where the parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract. *Id.* at 353.

This case is factually distinguishable from *Grand Trunk*. The indemnity agreement in *Grand Trunk* expressly required the defendant to both *indemnify* and *defend* the plaintiff against claims within the scope of the agreement. *Id.* at 352. Thus, the plaintiff in that case had a contractual duty to tender its defense. Conversely, the indemnity clause in this case does not impose any duty to defend, only the duty to indemnify. Further, there is no tender of defense requirement in situations involving codefendants with conflicting interests. *Detroit v Grant*, 135 Mich 626, 628-629; 98 NW 405 (1904); *Dep't of Transportation v Christensen*, 229 Mich App 417, 428; 581 NW2d 807 (1998). Here, plaintiff and defendant were each named as a defendant in the underlying action brought by Cooksey's estate, and that action involved competing claims of liability.

Regarding a settling indemnitee's burden of establishing its liability to the underlying plaintiff to be entitled to indemnification from an indemnitor, the Court in *St Luke's Hosp v Giertz*, 458 Mich 448, 454; 581 NW2d 665 (1998), quoted with approval the following from 41 Am Jur 2d, Indemnity, § 46, p 380 (emphasis added):

A person legally liable for damages who is entitled to indemnity may settle the claim and recover over against the indemnitor, even though he has not been compelled by judgment to pay the loss. In order to recover, the indemnitee settling the claim must show that the indemnitor was legally liable, and that the settlement was reasonable. *In the event that an indemnitor is not afforded the alternative of participating in a settlement or conducting the defense against the original claim, an indemnitee settling the claim will have the burden of establishing actual liability to the original plaintiff rather than the lesser burden of showing potential liability.*

In this case, the submitted evidence showed that defendant was afforded an opportunity to participate in the underlying settlement negotiations, but declined to do so. Therefore, it was only necessary that plaintiff show its potential liability in the underlying action to recover on its claim for indemnification from defendant.

Under the potential liability standard, plaintiff was only required to show that the settlement was reasonable and that the underlying factual situation was one covered by the indemnity contract. *Grand Trunk, supra* at 355.

To determine the reasonableness of the settlement, it is necessary to consider the amount of the settlement in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. *Id.* at 355-356.

The submitted evidence in this case established a reasonable likelihood that plaintiff would have been found liable if the underlying action had proceeded to trial. Further, plaintiff submitted evidence of jury verdicts in other electrocution cases that greatly exceeded the settlement amount here, as well as evidence that the settlement amount of \$2.3 million was within the range of usual settlements for electrocution cases. Defendant did not offer any evidence to counter plaintiff's evidence. Thus, defendant failed to show that there was a genuine issue of material fact with regard to whether plaintiff reasonably settled the underlying action for 2.3 million.

Whether the underlying factual situation is covered by the indemnity agreement requires only a straight-forward analysis of the underlying facts and the terms of the indemnity contract. *Grand Trunk, supra* at 357. An indemnity contract is construed in the same fashion as are contracts generally. *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). Where the language of the contract is clear and unambiguous, interpretation is limited to the actual words used. An unambiguous contract must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). The allegations of the complaint seeking indemnification, as well as the underlying complaint must be examined to determine whether there is an indemnity obligation. *Sherman v DeMaria Bldg*

*Co*, 203 Mich App 593, 601-602; 513 NW2d 187 (1994); *Paul v Bogle*, 193 Mich App 479, 496; 484 NW2d 728 (1992).

In this case, the indemnity clause required defendant to indemnify plaintiff where there is (1) loss or damage to any person, (2) resulting directly or indirectly from the use, misuse, or presence of plaintiff's electricity on the city's premises or elsewhere, (3) after the electricity passes the point of delivery to defendant. The underlying action involved a claim for loss to a person who was killed by the presence of electricity supplied by plaintiff after it was delivered to defendant. The underlying claim clearly falls within the scope of the parties' indemnity agreement.

Finally, we wish to briefly address defendant's argument that there is an internal inconsistency between finding that plaintiff had "potential liability" and the indemnity clause provision precluding its application if the loss or damage in the underlying case was "occasioned by active negligence of plaintiff, its agents or employees." As discussed below, it is not inconsistent to conclude that plaintiff had "potential liability" while at the same time concluding that there was no genuine issue of material fact that the exception to the indemnity provision regarding active negligence does not apply.

Our Court has made clear that the "potential liability" test first discussed in *Ford, supra*, does not require any plenary discussion or analysis of the indemnitee's liability in the underlying case. *Grand Trunk, supra* at 359-360. Instead, as the *Ford* Court explained, "potential liability" in these cases "means nothing more than that the indemnitee acted reasonably in settling the underlying suit." *Ford, supra* at 278. What is "reasonable in settling the underlying suit" is determined by considering the following two criteria:

The reasonableness of the settlement consists of two components, which are interrelated. The fact-finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. [*Id.*]

See, also, *Grand Trunk, supra* at 355-356; *Consolidated Rail, supra* at 676.

Thus, under the controlling case law, although the "risk of exposure" is a consideration in determining the reasonableness of the settlement in the underlying suit, the risk of exposure is determined by determining the probable amount of a judgment if the plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. Coming to this more general conclusion is quite different than the more specific and more demanding clause within the indemnification agreement, which requires that it be proven that the injury or damage was occasioned by the negligence of plaintiff. Thus, the standards are different and the generalized facts and circumstances presented by plaintiff regarding the settlement and

underlying case were sufficient to satisfy this “potential liability” standard<sup>1</sup>, but do not establish a genuine issue of material fact regarding active negligence under the indemnity provision.

For these reasons, the trial court did not err in denying defendant’s motion for summary disposition and granting summary disposition in favor of plaintiff.

## II. Docket No. 286460

Defendant argues that plaintiff was not entitled to case evaluation sanctions because its claim for contractual indemnification, the only claim on which it prevailed, was not submitted to case evaluation. We agree.

Although plaintiff alleged a claim for “indemnity” in its original complaint, that claim was not one for contractual indemnification. Indeed, plaintiff did not move to amend its complaint to add the contractual indemnification claim until after the case evaluation was conducted. Moreover, plaintiff asserted in its motion to amend that it was previously unaware of the contractual indemnity clause, and became aware of that clause only during discovery. Because the contractual indemnity claim, the only claim on which plaintiff prevailed, was never submitted to case evaluation and that claim was not added until after the case evaluation was conducted, plaintiff was not entitled to case evaluation sanctions for prevailing on that claim. *McCarthy v Auto Club Ins Ass’n*, 208 Mich App 97-102; 527 NW2d 524 (1994). Accordingly, we reverse the trial court’s award of case evaluation sanctions to plaintiff.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Christopher M. Murray

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<sup>1</sup> Although defendant is correct that most of the evidence and argument by plaintiff is geared towards the amount of the settlement, as opposed to plaintiff’s potential liability, plaintiff did argue that defendant would not be a defendant because of governmental immunity, and that the case presented a plethora of risks if it made it to a jury. This type of evidence and argument is relevant under *Ford*.